United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: June 27, 2005

TO : Curtis A. Wells, Regional Director
Region 16

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: APWU Local 1477 536-2581-3384
Case 16-CB-6876 536-2581-6733

This case was submitted for advice as to whether the Union violated its duty of fair representation when it withdrew the Charging Party's grievance solely because he was no longer a member of the bargaining unit, in an effort to reduce a significant backlog of pending grievances. We conclude that the Union did not violate Section 8(b)(1)(A) by engaging in this reasonable exercise of its discretion.

FACTS

In the spring of 2002, Charging Party Robert Garcia transferred from the clerk craft to the maintenance craft at the Tyler, Texas Post Office. Upon transferring, the USPS allegedly miscalculated his pay grade, which dropped his wage scale. On April 18, 2002, Garcia filed a grievance complaining of the alleged miscalculation. The Union combined Garcia's grievance with that of a co-worker, Larry Franklin, who had a similar experience.

On June 12, 2002, the USPS denied the combined grievance at step two. On July 1, 2002, the Union skipped step three and appealed the grievance directly to arbitration.

On April 17, 2004,[1] Garcia transferred out of the maintenance craft and into the mail handlers craft, which is represented by a different union. In the fall, the Union's Maintenance Craft Director Tom Cook held a pre-arbitration meeting with a USPS Labor Relations Specialist. Cook decided to remove Garcia from the grievance after he noticed that Garcia was no longer a member of the bargaining unit. Nevertheless, the Union continued to arbitrate Franklin's grievance. Cook further declined to arbitrate two other grievances for individuals who similarly were no longer members of the bargaining unit. In the same meeting, Cook also negotiated settlements in favor of two other, retired employees.

[1] All subsequent dates are in 2004 unless noted otherwise.

On October 29, an arbitrator ruled in Franklin's favor and ordered the USPS to make him whole for the wages he lost. Garcia learned he had been removed from the grievance after the arbitrator issued his decision.[2]

Garcia alleges that the Union breached its duty of fair representation by removing him from the backpay grievance because he was not a member of the bargaining unit. In response, the Union contends that it applied its lawful policy of declining to arbitrate grievances for employees who are no longer members of the bargaining unit. It asserts that this rule is a reasonable method of reducing the significant backlog of grievances pending arbitration, which is the third largest in the state of Texas behind only those of the Houston and Dallas APWU locals.[3] The Union acknowledged that its decision to withdraw from arbitration was not based on the merits of Garcia's grievance. The Union further acknowledged that it owes a continued duty to employees who transfer out of the unit while a grievance is pending resolution, which it satisfies when it can by negotiating settlements short of arbitration.

ACTION

We conclude that the Union did not violate Section 8(b)(1)(A) by applying its uniform policy to reduce its backlog by declining to arbitrate grievances on behalf of individuals who are no longer members of its bargaining unit.

A union that is the exclusive representative of bargaining unit employees complies with its duty of fair representation by avoiding arbitrary conduct and serving the interests of all employees in the unit without hostility or discrimination.[4] A union, however, is allowed a wide range of reasonableness, "subject always to complete good faith and honesty of purpose in the exercise of its discretion."[5]

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[2] On November 11, Garcia transferred back to the maintenance craft represented by the Union. He has not discussed his removal from the grievance with the Union since he returned to the bargaining unit.

[3] At least two grievances have been pending arbitration for over eight years.

[4] See Vaca v. Sipes, 386 U.S. 171, 177 (1967).

[5] Ford Motor Company v. Huffman, 345 U.S. 330, 338 (l953) (no breach of duty of fair representation by union agreement to contract clause that granted enhanced seniority to one

Thus, a union may balance the rights of individual employees against the collective good, or it may subordinate the interests of one group of employees to those of another group, if its conduct is based upon permissible considerations.[6] If a union resolves conflicts between employees or groups of employees in a rational, honest, and nonarbitrary manner, its conduct may be lawful under Section 8(b)(l)(A) even if some employees are adversely affected by its decision.[7]

A union's goals and methodology in reaching those goals "in the light of both the facts and the legal climate that confronted the negotiators at the time the decision was made" is the touchstone in determining whether union conduct that has a disparate impact on one group of employees is unlawfully arbitrary.[8] This is because "not every act of disparate treatment is proscribed by Section 8(b)(1)(A) of the Act, but only those which, because motivated by hostile, invidious, irrelevant, or unfair considerations, may be characterized as arbitrary conduct."[9] Accordingly, the Board has concluded that a union acted arbitrarily when it held an "unfair and invalid election" as a means of depriving an employee of a contractual right;[10] pitted a majority group against a minority "solely to advance [a

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group of employees, thus causing layoffs in another group of employees). See also Air Line Pilots Ass'n v. O'Neill, 499 U.S. 65, 78 (l99l) (breach of duty of fair representation only where union's conduct is so far outside a wide range of reasonableness "as to be irrational").

[6] Ford Motor Company v. Huffman, 345 U.S. at 338.

[7] See Humphrey v. Moore, 375 U.S. 335, 348-49 (l964) (no breach of duty of fair representation where union resolved seniority dispute in favor of one group of employees over another).

[8] Air Line Pilots v. O'Neill, 499 U.S. at 78 (union did not violate duty of fair representation even though strike settlement was allegedly worse than if union had merely ended the strike).

[9] Glass Bottle Blowers Assn. Local 149 (Anchor Hocking Corp.), 255 NLRB 715, 719 (1981).

[10] General Truck Drivers Local 315 (Rhodes & Jamieson, Ltd.), 217 NLRB 616, 617 (1975), enfd. 545 F.2d 1173 (9th Cir. 1976).

union official's] own personal political ambition";[11] and took action against an employee solely in order enforce a union official's personal policy that had not been adopted by the Union.[12]

On the other hand, a union may properly consider the interests of all unit employees in furtherance of a legitimate goal when deciding how or whether to pursue any individual grievant's claims. For instance, in Strick Corp.,[13] a union lawfully acquiesced to the employer's demand to abrogate an arbitral award that benefited 200 discharged strikers. The union, among other circumstances, was aware that absent its agreement, the employer was willing to "take a strike" that would harm the majority of unit employees. In Kaiser Steel Co.,[14] the Board held that the union lawfully limited distribution of a fund received in settlement of a class action grievance to employees who remained employed in the bargaining unit at the time the grievances were settled.[15] In so doing, the Board reasoned that the union's decision "simply constituted one of a series of reasonable, practical administrative determinations regarding those employees entitled to share in the settlement proceeds,"[16] in circumstances where it was difficult to precisely determine individual losses in pay. And in Crown Zellerbach Corp.,[17] the Board held that the union lawfully agreed to a distribution of bonus payments solely to employees who were actively employed on a certain date, even though the chosen date would necessarily diminish

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[11] Barton Brands, Ltd., 213 NLRB 640, 642 (1974), enf. den. 529 F.2d 793 (7th Cir. 1976).

[12] United States Postal Service, 240 NLRB 1198, 1199 (1979), enfd. in pert. part sub nom. NLRB v. APWU, 618 F.2d 1249 (8th Cir. 1980).

[13] 241 NLRB 210 (1979).

[14] Steelworkers Local Union No. 2869 (Kaiser Steel Corp.), 239 NLRB 982 (1978).

[15] Thus, employees who had retired, accepted supervisory positions, quit, been transferred out of the unit, or been discharged did not share in the settlement funds.

[16] 239 NLRB at 983, distinguishing District 65, Distributive Workers (Blume Associates, Inc.), 214 NLRB 1059 (1974) (union violated Section 8(b)(1)(A) when it distributed funds based solely on union activity).

[17] 266 NLRB 1231 (1983).

payments to other employees who were then on strike in support of a rival union. The Board reasoned that the union had acted consistently with past bargaining precedent and "out of a good faith belief that the bonus proposal would benefit a significant majority of the unit employees."[18]

Here, we conclude that the Union's goals and method of reaching those goals were reasonable and non-arbitrary. The Union declined to arbitrate Garcia's grievance pursuant to its existing policy of reducing its significant backlog of grievances in part by declining to arbitrate grievances of employees outside its bargaining unit. The Union's proffered rationale – saving its resources in order to reduce a significant backlog of arbitrable grievances – is not arbitrary, despite its disparate impact on Garcia. Rather, an assessment of resources is a permissible consideration when deciding whether to arbitrate a grievance.[19] Thus, the Union acted within its legal obligations when it chose to subordinate the interests of one group of employees to those of another.

[*FOIA Exemption 5, casehandling; includes footnotes 20 and 21*

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Here, the Union acknowledged an obligation of continuing to represent the interests of former unit employees whose grievances were filed when they were members of the bargaining unit. In fact, during the meeting with a USPS representative that led to the withdrawal of Garcia's grievance, the Union negotiated and concluded settlements of grievances filed by individuals who also were no longer in the bargaining unit due to retirement. We conclude here simply that in exercising its duty of fair representation vis-à-vis individuals no longer in the unit, a union retains its traditional discretion in deciding whether to arbitrate an individual's grievance. And, under the circumstances of this case, the Union did not violate Section 8(b)(1)(A) by striking the balance it did in furtherance of its lawful

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[18] Id. at 1232.

[19] See Transit Union Division 822, 305 NLRB 946, 949 (1991) (unions may screen grievances and press only those that it concludes will justify the expense and time involved), citing Griffin v. UAW, 469 F.2d 181, 183 (4th Cir. 1972).

goal of reducing its backlog of grievances pending arbitration.

Accordingly, the Region should dismiss the charge, absent withdrawal.

B.J.K.